

4-19. Homosexual conduct policy

The DCS, G-1 is responsible for the U.S. Army Homosexual Conduct Policy.

a. General.

(1) This policy implements Section 654, Title 10, United States Code (10 USC 654). The Department of Defense has stated that the suitability of persons to serve in the Army is based on their conduct and their ability to meet required standards of duty performance and discipline.

(2) Definitions are as follows:

(a) *Bisexual*. A person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in both homosexual and heterosexual acts.

(b) *Homosexual*. A person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts as further described in paragraph (3), below.

(c) *Sexual orientation*. An abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts.

(3) Homosexual conduct. "Homosexual conduct" is a homosexual act, a statement by a Soldier that demonstrates a propensity or intent to engage in homosexual acts, the solicitation of another to engage in homosexual act or acts, or a homosexual marriage or attempted marriage.

(a) A "homosexual act" means any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires and any bodily contact (for example, hand-holding, slow dancing, or kissing) that a reasonable person would understand to demonstrate a propensity or intent to engage in such bodily contact.

(b) A "statement by a person that he or she is a homosexual or bisexual or words to that effect" means language or behavior that a reasonable person would believe intends to convey the statement that a person engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. This may include statements such as "I am a homosexual," "I am gay," "I am a lesbian," "I have a homosexual orientation," and the like.

(c) A "homosexual marriage or attempted marriage" is when a person has married or attempted to marry a person known to be of the same biological sex (as evidenced by the external anatomy of the person involved).

b. *Accession policy*. A person's sexual orientation is considered a personal and private matter and is not a bar to entry or continued service unless manifested by homosexual conduct in a manner described in paragraph a(3). Applicants for enlistment, appointment, or induction into the Army will not be asked or required to reveal whether they are heterosexual, homosexual, or bisexual. Applicants also will not be required to reveal whether they have engaged in homosexual conduct unless independent evidence is received indicating that the applicant engaged in such conduct or unless the applicant volunteers a statement that he or she is a homosexual or bisexual or words to that effect. Homosexual conduct is grounds for barring entry into the Army, except as provided in AR 601-210. Applicants will be informed of the laws and regulations governing sexual conduct in the armed services, including homosexual conduct as defined in a(3). AR 601-210 governs the Army accession policy.

c. *Separation policy*. Homosexual conduct is grounds for separation from the Army under the terms set forth in paragraph a(3). AR 600-8-24, AR 635-200, AR 135-175, and AR 135-178 govern Army separation policies.

d. Guidelines for command-directed fact-finding inquiries into homosexual conduct.

(1) Responsibilities.

(a) Only a Soldier's commander is authorized to initiate fact-finding inquiries involving homosexual conduct. A commander may initiate a fact-finding inquiry only when he or she has received credible information that there is a basis for discharge. Commanders are accountable for ensuring that inquiries are conducted properly and that no abuse of authority occurs.

(b) A fact-finding inquiry may be conducted by the commander personally or by a person he or she appoints. It may consist of an examination of the information reported or a more extensive investigation as necessary.

(c) The inquiry should gather all credible information that directly relates to the grounds for possible separation. Inquiries will be limited to the actual circumstances directly relevant to the specific allegations.

(d) If a commander has credible evidence of possible criminal conduct, he or she will follow the procedures outlined in AR 27-10 and AR 195-2.

(e) These guidelines do not apply to activities of the Criminal Investigation Division (CID) and other DOD law enforcement organizations that are governed by AR 195-2.

(2) Basis for conducting inquiries.

(a) A commander will initiate an inquiry only if he or she has credible information that there is a basis for discharge. Credible information exists when the information, considering its source and the surrounding circumstances, supports a reasonable belief that a Soldier has engaged in homosexual conduct. It requires a determination based on articulable facts, not just a belief or suspicion.

- (b) A basis for discharge exists if—
1. The Soldier has engaged in a homosexual act.
 2. The Soldier has said that he or she is a homosexual or bisexual, or made some other statement that indicates a propensity or intent to engage in homosexual acts, or
 3. The Soldier has married or attempted to marry a person of the same sex.
- (3) *Credible information.* Credible information does not exist, for example, when—
- (a) The individual is suspected of engaging in homosexual conduct, but there is no credible information, as described, that supports the suspicion.
 - (b) The only information is the opinion of others that a Soldier is a homosexual.
 - (c) The inquiry would be based on rumor, suspicion, or capricious claims concerning a Soldier's sexual orientation.
 - (d) The only information known is an associational activity, such as going to a gay bar, possessing or reading homosexual publications, associating with known homosexuals, or marching in a gay rights rally in civilian clothes. Such activity, in and of itself, does not provide the evidence of homosexual conduct.
- (4) *Credible information.* Credible information exists, for example, when—
- (a) A reliable person states that he or she observed or heard a Soldier engaging in homosexual acts or saying that he or she is a homosexual or bisexual or is married to a member of the same sex.
 - (b) A reliable person states that he or she heard, observed, or discovered a Soldier make a spoken or written statement that a reasonable person would believe was intended to convey the fact that he or she engages in, attempts to engage in, or has the propensity or intent to engage in homosexual acts.
 - (c) A reliable person states that he or she observed behavior that amounts to a nonverbal statement by a Soldier that he or she is a homosexual or bisexual (that is, behavior that a reasonable person would believe intended to convey the statement that the Soldier engages in, attempts to engage in, or has the propensity or intent to engage in homosexual acts).
- (5) *Procedures.*
- (a) Informal fact-finding inquiries and administrative separation procedures are the preferred method of addressing homosexual conduct. This does not prevent disciplinary action or trial by courts-martial when appropriate.
 - (b) Commanders will exercise sound discretion regarding when credible information exists. They will examine the information and decide whether an inquiry is warranted or whether no action should be taken.
 - (c) Commanders or appointed inquiry officers will not ask, and Soldiers will not be required to reveal whether a Soldier is a heterosexual, homosexual, or bisexual. However, upon receipt of credible information of homosexual conduct, (as described in a(3)) commanders or appointed inquiry officials may ask Soldiers if they engaged in such conduct. The Soldier should first be advised of the DOD policy on homosexual conduct (and rights under Article 31(b), UCMJ, if applicable). Should the Soldier choose not to discuss the matter further, the commander should consider other available information. Nothing in this provision precludes questioning a Soldier about any information provided by the Soldier in the course of the fact-finding inquiry or any related proceedings; nor does it provide the Soldier with any basis for challenging the validity of any proceeding or the use of any evidence, including a statement by the Soldier in any proceeding.
 - (d) At any given point in the inquiry, the commander or appointed inquiry official must be able to clearly and specifically explain which grounds for separation he or she is attempting to verify and how the information being collected relates to those specific separation grounds.
 - (e) A statement by a Soldier that he or she is a homosexual or bisexual creates a rebuttable presumption that the Soldier engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. The Soldier will be given the opportunity to present evidence demonstrating that he or she does not engage in, attempt to engage in, or has a propensity or intent to engage in homosexual acts.
 - (f) The Soldier bears the burden of proving, by a preponderance of evidence, that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in, homosexual acts.
- (6) *Legal effect.* The procedures set forth in this paragraph create no substantive or procedural rights.
- e. Investigation policy.* Investigations or inquiries will not be initiated solely to determine whether a member is a heterosexual, homosexual, or bisexual. There must be credible information that a basis for disciplinary action or discharge exists. The information that constitutes the basis of the investigation must be deemed credible by the criminal investigation organization commander as well as the Soldier's commander in most cases. In most cases of homosexual admission, no investigation is required. However, in instances where the commander feels that the admission may not be credible, an inquiry may be appropriate. The initiation of any substantial investigation into whether an admission of homosexuality was made for the purpose of seeking separation from the Army and/or whether recoupment of financial benefits is warranted must be approved at the Army secretariat level. A "substantial investigation" is defined as one that extends beyond questioning the member, individuals suggested by the member for interview, and the member's immediate supervisory chain of command. The Secretary of the Army has designated the Assistant Secretary of the Army for Manpower and Reserve Affairs as the approval authority for initiation of substantial investigations. Requests for approval will be forwarded through command channels to the ASA(M&RA). No further action will be taken,

including processing the Soldier for discharge, until either permission for initiating the investigation is denied or permission is granted and the investigation is concluded. AR 195-2 and AR 15-6 provide guidance on the investigation of sexual misconduct.

f. Security. Individuals will not be asked or required to reveal on personnel security questionnaires whether they are heterosexual, homosexual, or bisexual. An individual's sexual conduct, whether homosexual or heterosexual, is a legitimate security concern only if it could make an individual vulnerable to exploitation or coercion, or indicate a lack of trustworthiness, reliability, or good judgment that is required of anyone with access to classified information. AR 380-67 provides additional guidance.

g. Training.

(1) All officers and enlisted personnel of the Active Army and Reserve Components will receive briefings upon entry and periodically thereafter with a detailed explanation of regulations governing sexual conduct by members of the Armed Forces. Briefings will include policies on homosexual conduct and applicable laws in accordance with 10 USC 654 and Article 137, UCMJ.

(2) The Army uses the DOD Homosexual Conduct Policy Training Plan as a guide in training commanders and personnel involved in recruiting, accession processing, criminal investigations, and administrative separations. The training plan includes detailed hypothetical situations that illustrate how military personnel should approach specific, concrete scenarios under the new DOD policy on homosexual conduct.